



The Workplace Unfairness Act of 2010

There are currently two federal laws protecting employees from sex-based pay discrimination: Title VII of Civil Rights Act of 1964 (amended just last year by the Lilly Ledbetter Fair Pay Act); and the Equal Pay Act of 1963 (EPA). Yet Democrats hope to pass a new federal law - [the Paycheck Fairness Act \(PFA\)](#) – during the lame duck session before their majorities erode in the next Congress.

The PFA is based on the assumption that the wage gap between working men and women is a result of employer discrimination. The legislation amends the Fair Labor Standards Act of 1938 (FLSA) to broaden enforcement practices and remedies for intentional and unintentional sex-based pay discrimination, limits the allowable reasons for salary differences between male and female employees, and increases the opportunities for workers to join class action lawsuits.

The PFA will hamstring employers who want to reward diligent workers, making it impossible to base salaries on the quality of work. Ultimately, the PFA will suppress wage growth and hiring at a time when the government should be encouraging the expansion of both. Contrary to its name, the PFA will create unfairness in the workplace.

Sufficient Protection Already Exists

The Democrats' approach to addressing the wage gap is a disproportionate response to a problem that research indicates may not even exist. There is significant evidence that the approximately five to seven percent wage gap may be the result of women preferring non-wage compensation, such as health insurance or fringe benefits, over higher salaries.¹ Moreover, both Title VII and the EPA currently provide a way for those who are discriminated against to file complaints against their employers and pursue financial remedies.² Of the almost 29,000 Title VII and EPA discrimination charges filed in 2009, only 1,375 were found to have reasonable cause.³⁴ And employees with successfully resolved Title VII and EPA discrimination claims in 2009 received more than \$125 million.⁵⁶

In other words, even though only a fraction of the complaints filed with the EEOC are meritorious and tens of millions of dollars were awarded last year for violations of current law, the Democrats want to make it easier to file discrimination charges, regardless of whether or not the claim has any merit.

Limits Employer Salary Decisions

The PFA would change how employers justify salary differences by creating a new EPA standard. The PFA would only allow employers to pay employees different wages if the difference was not sex-based, "job related," and "consistent with business necessity."⁷ Additionally, employers would be required to prove they could not implement an alternative that would produce the same business outcome without creating a difference in salaries.

Under the PFA, if a male employee were the lead on a project and his manager wanted to give him a bonus for completing that project, the manager would not be able to do so without fear of a female employee filing an EPA-related discrimination claim.

Or if a male employee notified his manager that he has a job offer from a different company, the manager might not be able to offer him a salary increase to incentivize him to stay, because the pay discrepancy could expose the employer to claims of discrimination.

In the end, employers would be unable to make salary changes for one employee without fearing a discrimination lawsuit from another, and business decisions could be left in the hands of the courts.

Harms Small Businesses

The PFA would apply to all business that must comply with the FLSA, meaning it applies to all employers except for the very smallest—those with fewer than two employees or those with less than \$500,000 a year in business.⁸ The PFA would expose these small businesses to costly, frivolous lawsuits that could put them out of business.

Both the [U.S. Chamber of Commerce](#) and the [National Federation of Independent Business \(NFIB\)](#) oppose the PFA. The U.S. Chamber's objections extend beyond the impact on existing companies to the broader concern that the PFA "creates a disincentive to do business here in the United States."⁹

Promotes Class Action Lawsuits

Under current law, the EPA requires that employees give written consent to join a class action lawsuit. The PFA would change that, automatically including employees in the class unless they specifically opt out. This would be a boon for trial lawyers, as it would likely increase the number of class action lawsuits filed, make it easier to obtain class certification, and increase the size of the class, even if the discrimination claim is frivolous.

Allows Unlimited Damage Awards

Under current law, employees who win a discrimination claim under the EPA can receive back pay and twice that amount in liquidated damages for a willful violation, but not compensatory or punitive damages. While compensatory and punitive damages are awarded under Title VII, they are only given if there is intentional discrimination, and the award amount is capped at \$300,000. The PFA would not only allow unlimited compensatory and punitive damage awards under the EPA, but also allow payments even when the discrimination was unintentional. The result could be awards that bankrupt a company.

The Real Impact of The Paycheck Fairness Act

If enacted, the PFA would force employers to go on the defensive, stripping them of the freedom to make individually based salary decisions, offer performance bonuses, provide varying pay for working different shifts or at different locations, or create hazard-pay programs without the fear of lawsuits. It would force businesses to purchase expanded legal liability insurance, which would increase their costs and limit business expansion.¹⁰ As the [National Association of Manufacturers](#) said in a November 15, 2010, letter to Senators opposing the PFA, "it is difficult to imagine a scenario in which the bill would not lead to lower wages and fewer jobs."¹¹

In the end, the PFA would further insert the federal government into the private workplace and expose employers to a significant increase in the cost of doing business. Ultimately, all the Paycheck Fairness Act will accomplish is to further stifle wage and job growth at a time when American workers can least afford it.

¹ "An Analysis of Reasons for the Disparity in Wages Between Men and Women" by CONSAD Research Corporation, January 12, 2009, <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf>.

² Testimony of Jane M. McFetridge on the Paycheck Fairness Act before the U.S. Senate Committee on Health, Education, Labor, and Pensions, March 11, 2010, <http://help.senate.gov/imo/media/doc/mcfetridge.pdf>.

³ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Sex-Based Charge Statistics, FY97-FY09, <http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm>.

⁴ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Equal Pay Act Charge Statistics, FY97-FY09, <http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm>.

⁵ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Sex-Based Charge Statistics, FY97-FY09.

⁶ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Equal Pay Act Charge Statistics, FY97-FY09.

⁷ The Paycheck Fairness Act (S. 3772), http://thomas.loc.gov/home/gpoxmlc111/s3772_pcs.xml.

⁸ U.S. Department of Labor's Wage and Hour Division PowerPoint on the Fair Labor Standards Act <http://www.dol.gov/whd/flsa/comprehensive.ppt>.

⁹ "Business Community Opposes Paycheck Fairness Act," by Caroline May, The Daily Caller, November 13, 2010 <http://dailycaller.com/2010/11/13/business-community-opposes-paycheck-fairness-act/#ixzz15NEW9g1m>.

¹⁰ National Association of Manufacturers ManuFACTS: The Paycheck Fairness Act, <http://www.nam.org/~media/9363BA8DC26540F2BCFC4E53B2965A3B.ashx>.

¹¹ National Association of Manufacturers Key Vote Letter on The Paycheck Fairness Act (S. 3772), http://www.nam.org/~media/F7A55F0BDD76467991F9EB0B3E2A0CDE/Paycheck_Fairness_Senate.pdf.